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No. 92-989

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

v.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARKANSAS, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in a capital felony murder prosecution, the Eighth Amendment prohibits the sentencer from considering as an aggravating circumstance that the murder was committed in the perpetration of a felony?

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INTEREST OF *AMICI*

This case presents important questions concerning the constitutionality of State capital sentencing schemes under the Eighth and Fourteenth Amendments and the availability of capital punishment for felony murder. *Amici* are States who have an interest in the orderly and proper admininstration of their capital sentencing statutes.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Justice Drowota of the Supreme Court of Tennessee aptly characterized the respondent's crime: "This torture-murder of a kidnapped child unquestionably is one of the most aggravated killings that this Court has seen. The fourteen-year old victim's ordeal . . . began at 7:30 p.m. and ended at 11 p.m. This brutal and tragic murder is certainly one of the 'worst of the bad.'" *State v. Middlebrooks*, 840 S.W.2d 317, 350 (Tenn. 1992) (Drowota, J., concurring and dissenting), *cert. granted*, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993).

On the evening of April 26, 1987, fourteen year old Kerrick Majors and four friends spotted a flea market being set up by three homeless persons: respondent Donald Middlebrooks, his wife Tammy Middlebrooks, and Roger Brewington. After the boys began looking at the flea market items, Tammy Middlebrooks shouted for the boys to "leave our stuff alone!" The boys ran but Donald Middlebrooks and Brewington caught Majors, who was seen being dragged toward the flea market and was knocked down after respondent Middlebrooks struck him in the face. *Middlebrooks*, 840 S.W.2d at 323-24.

Majors' nude mutilated body was discovered the next afternoon in a dry creek bed near the area where he was apprehended by respondent and Brewington. In addition to deep stab wounds, abrasions and bruises on

his body, an odor of urine was noticed around Majors' face. At trial, a forensic pathologist testified that Majors was alive while incisions had been made on his body. Majors apparently bled to death. *Id.* at 324.

During the early hours of April 28th, Brewington led officers to the location of a knife with a brass knuckle handle and to a wooded area where the Middlebrooks were subsequently arrested. During the middle of the same day, respondent provided a video-taped statement, in which he contended his involvement in the murder of Majors was limited while Brewington played the lead role. According to this statement, Majors' hands were tied; Brewington beat Majors with the brass knuckles on the knife, hit him with a stick, and urinated in his mouth. *Id.* The Tennessee Supreme Court majority opinion recounted the torture inflicted upon Majors:

> [Respondent] admitted striking Majors with his open hand and on the leg with a switch. [Respondent] said that his wife Tammy had slapped Majors and burned Majors' nose with a cigarette lighter as Brewington urged her on. Brewington hit Majors on his testicles, threatened to cut "it" open, stuck a stick up Majors' anus, hit him some more with the brass knuckles, wiped the victim's blood on himself, beat his mouth and tongue with a stick, dropped the knife on him, gagged him, and slashed his wrist. Finally, when [respondent] asked Brewington to stop because the victim's crying and pleading were getting on his nerves, Brewington gave the victim "the kiss of death" on the forehead. Brewington then gave [respondent] the knife and told him to stab Majors. When [respondent] refused, Brewington stabbed

> Majors. [Respondent] then reluctantly stabbed the victim, according to him, "to prove to Roger that I guess I was cooler" and to put Majors out of his misery. In a previous statement, however, [respondent] had said that he had stabbed Majors twice. . . . [¶] The next day, [respondent] said he and Brewington went back to where they had left the body. Brewington kicked it and made the "X" lacerations at this time. [Respondent] said he then covered Majors with a foam mattress.

Id. at 324-25.

A jury found respondent guilty of first-degree felony murder and aggravated kidnapping, but not guilty of premeditated first-degree murder, armed robbery, or aggravated sexual battery. *Id.* at 325. During the sentencing phase, the jury found two aggravating circumstances beyond a reasonable doubt: (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (2) the murder was committed while [respondent] was engaged in committing a felony. Respondent was sentenced to death after the jury concluded these aggravating circumstances outweighed established mitigating circumstances. *Id.* at 325-26. Respondent was also sentenced to 60 years for aggravated kidnapping. *Id.* at 323.

On appeal, a unanimous Tennessee Supreme Court affirmed respondent's guilt. *See id.* at 323; *id.* at 347 (Drowota, J., concurring and dissenting); *id.* at 350 (Reid, C.J., concurring and dissenting). Although the Tennessee Supreme Court majority concluded there was ample evidence to support the first aggravating factor, *id.* at 347, the case was ordered remanded for resentencing after the

majority decided, *sua sponte*, *see id.* at 323, 335; *id.* at 347 (Drowota, J., concurring and dissenting), that the Tennessee statute in issue was unconstitutional as applied because the "double counting" of the felony murder at the guilt and penalty phases failed to narrow the class of persons eligible for the death penalty. *Id.* at 341, 342, 346. This Court granted certiorari. *Tennessee v. Middlebrooks*, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993).

SUMMARY OF ARGUMENT

This case furnishes an opportunity for this Court to clarify two important capital issues: (1) the availability of capital punishment for felony murders; and (2) the narrowing function required for capital cases under the Eighth Amendment. A substantial number of capital cases pending on direct review may be affected by the Court's decision in this case. *See, e.g.*, Appendix B.

The Tennessee statute at bar satisfies the Eighth Amendment narrowing function by narrowing the class of death-eligible murders to include felony murder. Under this Court's precedent, the narrowing under this statute serves as a legitimate basis to minimize the risk of arbitrary and capricious death sentences and to distinguish the class of cases where the death penalty may be imposed from those where it is not. The ultimate determination of sentence will depend on the actual facts and circumstances of the murder, the defendant's record, and the weight of this evidence against any available mitigating evidence.

Amici respectfully contend that *Jurek v. Texas*, 428 U.S. 262 (1976), and *Lowenfield v. Phelps*, 484 U.S. 231 (1988), should control the disposition of this case. These cases make clear that as long as the Eighth Amendment narrowing function is satisfied in the capital sentencing scheme, it need not be fulfilled at any particular stage. Several lower court decisions have relied upon these precedents to reject "double counting" arguments identical or similar to those raised in this case. The rationale relied upon by the Tennessee Supreme Court majority substantially resembles the petitioner's contention in *Lowenfield*, which this Court rejected as "rest[ing] on a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 244. There can be no impermissible "double counting" since the narrowing function is fulfilled at the guilt phase by the Legislature's definition of a capital offense to include first-degree felony murder. Nothing more is required under the Eighth Amendment. If the Tennessee Supreme Court majority position were adopted, a new "double narrowing" Eighth Amendment standard would be imposed on State capital sentencing schemes.

In the event that this Court determines that the Tennessee statute does not satisfy the narrowing function as articulated in *Jurek* and *Lowenfield*, this case presents an opportunity to clarify that the narrowing function may be fulfilled by other provisions in the capital sentencing scheme. As elaborated below, the Tennessee statute, considered in its entirety, satisfies Eighth Amendment standards to guide and channel the jury's discretion "by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976)

(joint opinion of Stewart, Powell, & Stevens, JJ.). Since the Eighth Amendment has been satisfied, the issues presented in this case are a byproduct of legislative – not constitutional – policy.

ARGUMENT

I. The Tennessee Supreme Court Majority Improperly Applied the Eighth Amendment Narrowing Requirement Under this Court's Precedent

A. Overview: The Felony Murder Rule and Capital Punishment

This Court has appropriately noted that:

> some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.

Tison v. Arizona, 481 U.S. 137, 157 (1987). As Justice O'Connor has observed, each felony murder case presents a "unique and complex mixture of facts" which must be assessed by the factfinder to determine the defendant's culpability. *Enmund v. Florida*, 458 U.S. 782, 825-26 (1982) (O'Connor, J., dissenting). This torture-murder and kidnapping case is an example of such an inhumane and senseless killing. The jury properly convicted

and sentenced the respondent after evaluating his culpability and role in the felony murder under the Tennessee capital statute, which conforms with Eighth Amendment standards.[1]

Recognizing that the Eighth Amendment does not prohibit capital punishment for *all* felony murders, this Court has categorized felony murders into subsets and considered the constitutional availability of capital punishment for felony murders under these subgroupings. At one end of the continuum, capital punishment may be imposed under the Eighth Amendment upon a "felony murderer who actually killed, attempted to kill, or intended to kill." *Tison*, 481 U.S. at 150; *see also Enmund*, 458 U.S. at 797, 801. At the other extreme of the continuum, capital punishment is not constitutionally permissible for a minor actor in the felony (*e.g.*, was not on the scene) who did not intend to kill or did not have any culpable mental state. *Tison*, 481 U.S. at 149-50; *Cabana v. Bullock*, 474 U.S. 376, 385 (1986); *Enmund*, 458 U.S. at 797, 801. In the intermediate subset, capital punishment may be constitutionally available for felony murders where there is "major participation in the felony committed, combined with reckless indifference to human life." *Tison*, 481 U.S. at 158.

This case provides this Court a further opportunity to clarify Eighth Amendment standards concerning cases

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[1] The Eighth Amendment Cruel and Unusual Punishment Clause is applicable to the States through the Fourteenth Amendment Due Process Clause. *See Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)).

falling within the intermediate subset. If the Tennessee Supreme Court majority decision is left undisturbed, capital punishment for felony murders might not be available where at least one of the aggravating circumstances was for felony murder.

A majority of capital punishment States permit capital punishment for felony murders. As a matter of legislative prerogative and consistent with the Eighth Amendment, States have varied the circumstances under which the offense of felony murder may be subject to a capital sentence. Some capital jurisdictions, for example, require an intent to kill before capital punishment may be imposed for felony murder.[2] In addition to the Tennessee capital statute at bar, seven other States – Arizona, California, Florida, Georgia, Maryland, Montana, and North Carolina – now fall into the classification, designated by this Court, allowing the death penalty for "felony murder *simpliciter*."[3] In these States, felony murder is one of a small class of murders which may be subject to the death penalty and the felony murder may also serve as an aggravating circumstance. *See, e.g.*, Appendix A & notes

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[2] *See Tison*, 481 U.S. at 158; *Enmund*, 458 U.S. at 790 & n.7; *see also* Appendix A (listing States). This Court has made clear that this policy decision to interpose an intent requirement is not constitutionally mandated. *Tison*, 481 U.S. at 158.

[3] *See Tison*, 481 U.S. at 153 & n.8; *see also Enmund*, 458 U.S. at 789 & n.5; Appendix A (listing States).

The Tennessee statute was amended in 1989, subsequent to the facts arising in this case. *See Middlebrooks*, 840 S.W.2d at 335-37 & n.6. The pre-1989 Tennessee law and the category of felony murder *simpliciter* are therefore in issue before the Court in this case.

13 & 15, *infra*. Finally, some States preclude the availability of the death penalty for felony murder as a matter of legislative policy. *See Tison*, 481 U.S. at 154 & n.10; *see also Enmund*, 458 U.S. at 789 & n.6; Appendix A.

A review of pending capital cases on direct review shows the broad ramifications of the *Middlebrooks* decision, if left intact. For example, in California there are currently 212 capital cases pending on direct appeal. Of these, 146 felony murder conviction cases (or sixty-eight percent of the total) involve at least one felony-murder special circumstance. *See* Appendix B.

B. The Eighth Amendment Narrowing Function and the Purported "Double Counting"

On several occasions, this Court has discussed the Eighth Amendment requirement that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield*, 484 U.S. at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). This narrowing function advances the Eighth Amendment objective of ensuring that sentencing discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and supplies a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 198 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also Spaziano v.*

Florida, 468 U.S. 447, 460 & n.7 (1984); *Proffitt*, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.).

The Tennessee Supreme Court majority found the Tennessee capital statute unconstitutional because it permitted a "double counting" at the guilt and penalty phases, since "the aggravating circumstance of committing a murder during a felony essentially duplicated the elements of the offense of first-degree felony murder." *Middlebrooks*, 840 S.W.2d at 341. In fact, as will be shown, the "double counting" characterization is a misnomer in light of this Court's case law, which makes clear that the narrowing function may be performed at *either* the guilt or penalty phases of a capital trial. Accordingly, if the narrowing function is already constitutionally satisfied at the guilt phase by the Legislature's definition of a capital offense, there can be no impermissible "double counting" under the Eighth Amendment.

C. This Case is Controlled by *Jurek* and *Lowenfield*

The Tennessee Supreme Court majority's untenable interpretation of the Eighth Amendment is illustrated by the following hypothetical: Assume, similar to the facts at bar, that a jury (1) found a defendant guilty of first-degree felony murder; (2) found a sole aggravating circumstance that the murder was heinous, atrocious or cruel for involving torture; and (3) concluded that this aggravating factor outweighed any mitigating circumstances. These facts are identical to the instant matter with the exception that the jury at bar found a second

aggravating circumstance of felony murder.[4] The Tennessee Supreme Court majority did not suggest that the narrowing function was violated by this example and did not hold that a felony-murder aggravating circumstance for any other capital offense is impermissible. Yet in the instant matter, the Eighth Amendment is violated, under the majority analysis, by the addition of the second aggravating factor for felony murder. The underlying premise of the majority opinion is that unconstitutional "double counting" occurs by the use of a felony murder aggravating circumstance *only* in first-degree felony murder capital cases. *See Middlebrooks*, 840 S.W.2d at 346 (holding).

This premise, if accepted, raises a fundamental question concerning the availability of capital punishment. If it is clear that a torture-murder following a first-degree felony murder verdict may be subject to capital punishment, then why should capital punishment suddenly be unavailable if the jury found a defendant guilty of first-degree felony murder and considered the felony-murder circumstances of the crime before rendering its sentence? In short, a jury verdict of felony murder is sufficient to narrow the class of murderers to those for which capital

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[4] In fact, the Tennessee Supreme Court unanimously affirmed the jury's guilty verdict on first-degree felony murder, *see Middlebrooks*, 840 S.W.2d at 323; *id.* at 347 (Drowota, J., concurring and dissenting); *id.* at 350 (Reid, C.J., concurring and dissenting), and at least a majority concluded ample evidence supported the aggravating circumstance of a heinous, atrocious, or cruel murder in that it involved torture or depravity of mind. *Id.* at 347.

punishment might be an appropriate penalty. The ultimate determination of sentence will depend on the actual facts and circumstances of the murder, the defendant's record, and the weight of this evidence against any available mitigating evidence.

In other related capital contexts, this Court has confronted and rejected similar "double counting" contentions. This precedent shows that the Eighth Amendment narrowing function was properly satisfied by the Tennessee statute at bar. In *Lowenfield*, this Court considered a challenge to the Louisiana capital statute where the only aggravating circumstance found by the jury was identical to an element for the capital offense of first-degree murder. *See* 484 U.S. at 241, 243. In upholding the Louisiana statute, this Court held:

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.[5]

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[5] *Lowenfield*, 484 U.S. at 246. In *Lowenfield*, one element of first-degree murder under Louisiana law was that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"; the overlapping aggravating circumstance was that "the offender knowingly created a risk of death or great bodily harm to more than one person." *Id.* at 243. Both provisions were similarly construed under State law. *Id.* at 243-44.

A related "double counting" issue was raised concerning the Arkansas capital statute. Initially, the Eighth Circuit held

Lowenfield relied upon *Jurek v. Texas*, 428 U.S. 262 (1976), a case where the narrowing function was also performed at the guilt phase by the Texas Legislature's definition of the death-eligible offenses. The *Jurek* plurality opinion observed that while the Texas capital sentencing scheme – unlike other State capital statutes – did not contain a list of statutory aggravating circumstances to be considered by the sentencer, the Legislature's "action in *narrowing the categories of murders* for which a death sentence may ever be imposed serves much the same purpose." *Id.* at 270 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added). Under the Texas statute, only five enumerated classes of murders could be eligible for the death penalty, one of which was felony murder. *Id.* at 265, 268 (citing Texas Penal Code § 19.03(b)(2) ("murder in the course of committing or

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that a pecuniary gain aggravating circumstance could not be considered in the sentencing phase of robbery/murder cases because it duplicated an element of the offense of robbery/murder established in the guilt phase. *See Collins v. Lockhart*, 754 F.2d 258, 264 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). Relying upon *Lowenfield*, the Eighth Circuit subsequently overruled *Collins*. *See Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.) ("*Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*."), *cert. denied*, 493 U.S. 959 (1989). While this Court has not directly considered the merits of either *Collins* or *Perry*, it has subsequently presumed the correctness of the *Perry* decision. *See Lockhart v. Fretwell*, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (noting "it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on 'double counting' "); *see also id.* at 841-42, 843 & n.4.

attempting to commit kidnapping, burglary, robbery, forcible rape, or arson")).[6]

A comparison with the statutes considered by this Court in *Jurek* and *Lowenfield* shows that the Tennessee statute at bar clearly satisfies the Eighth Amendment narrowing requirement. The Tennessee statute is in fact more stringent than the Texas statute upheld in *Jurek*, as it imposes additional prerequisites (beyond that required by the Eighth Amendment) before any capital defendant may be sentenced to death. *First*, at the guilt phase, a

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[6] The *Jurek* opinion concluded that:

> in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance [*e.g.*, felony murder] *before* the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and . . . other . . . States is that the death penalty is an available sentencing option – even potentially – for a *smaller class of murders* in Texas. . . . [¶] Thus, Texas law essentially requires that one of five aggravating circumstances be found *before a defendant can be found guilty of capital murder*, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. [In this manner,] the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Jurek, 428 U.S. at 270-71, 273-74 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added); *see also Zant*, 462 U.S. at 879 ("The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage.").

Tennessee jury must find that the defendant committed a death-eligible offense (*e.g.*, first-degree felony murder). *See* note 13, *infra*. *Second*, at the penalty phase, the jury must conclude that at least one of twelve enumerated aggravating circumstances have been established beyond a reasonable doubt. One of these aggravating circumstances is felony murder. *See* note 15, *infra*. *Finally*, the jury must find the existence of any mitigating circumstances and determine whether the aggravating circumstances outweigh the mitigating circumstances. *See* note 16, *infra*.

In contrast, the Texas statute in issue in *Jurek*, *inter alia*, only included the first and third steps. This Court determined that no more was constitutionally required. Instead, here, as a matter of legislative policy, the Tennessee Legislature interposed an additional second step. In this regard, the Tennessee statute at bar is similar to the Louisiana statute considered in *Lowenfield*, which also contained the three highlighted steps.[7] *Lowenfield* makes

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[7] In one distinction not pertinent to the "double counting" issue, Tennessee is a "weighing" State while Louisiana is not. *See Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1138, 117 L.Ed.2d 367 (1992); *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (defining "weighing state"). This distinction reiterates the flexibility afforded to States in adopting capital sentencing schemes which comport with Eighth Amendment requirements. *See, e.g., Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990) ("The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by the jury."); *Zant*, 462 U.S. at 876 n.13 ("[S]pecific standards for balancing aggravating against mitigating circumstances are not constitutionally required.").

clear that as long as the narrowing function is satisfied in the capital sentencing scheme, it need not be performed through aggravating circumstances. As noted in *Lowenfield*,

> The use of 'aggravating circumstances' is not an end in itself, but [one] means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. . . . [¶] The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.

484 U.S. at 244, 246. The Tennessee Supreme Court majority, in a conclusory manner, dismissed *Lowenfield* as "inapposite" for purposes of Eighth Amendment analysis, *see Middlebrooks*, 840 S.W.2d at 346, and, in so doing, inexplicably rejected prior Tennessee Supreme Court decisions expressly relying upon *Lowenfield*. *See Middlebrooks*, 840 S.W.2d at 348 (Drowota, J., concurring and dissenting) (citing *State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988) (citing *Lowenfield* and other cases), *rev'd*, *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992)).

However, as can be seen from *Jurek* and *Lowenfield*, if the Tennessee Supreme Court majority position were adopted, a new Eighth Amendment requirement would be imposed on State capital statutes, requiring the narrowing function to be fulfilled *twice*: first, in the definition of the capital offense during the guilt phase, and second, through aggravating circumstances at the penalty phase. Under this analysis, the class of all murderers would have to be distinguished from those who were

merely eligible for the death penalty. A second narrowing would be required to segregate those who were eligible for the death penalty from those who could actually be sentenced to death after considering aggravating and mitigating circumstances. This "double narrowing," quite simply, is not required by the Eighth Amendment or by any of this Court's precedents.

Under the rationale and holdings of *Jurek* and *Lowenfield*, the narrowing function required by the Eighth Amendment is fulfilled when the Tennessee statute narrows the class of murders which may be subject to capital punishment, one of which is felony murder. Other courts have reached the same conclusion in considering similar capital statutes.[8] Federal and State courts have relied upon this Court's guidance in *Lowenfield* to reject a claim

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[8] *See, e.g., Perry*, 871 F.2d at 1393 (felony murder as a death-eligible offense "serve[s] to narrow the class of death eligible murderers from all murderers"); *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir. 1988) (noting "narrowing function was performed by the jury at the guilt phase" when defendant was convicted of felony murder); *People v. Anderson*, 43 Cal.3d 1104, 1147 (Cal. 1987) (noting that "by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'") (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)); *see also Jurek v. State*, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975) (The Texas statute "limits the circumstances under which the State may seek the death penalty to a *small group of narrowly defined and particularly brutal offenses*. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances.") (emphasis added) (quoted in *Jurek*, 428 U.S. at 270), *aff'd*, 428 U.S. 262 (1976).

that felony murder may not serve as an aggravating circumstance in a capital case for a person convicted of felony murder.[9] These courts have also relied upon this

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[9] *See Johnson v. Dugger*, 932 F.2d 1360, 1368-69 (11th Cir.) (relying, in part, upon *Lowenfield* to reject argument "that Florida law, by permitting [a] conviction and [a] death sentence to be predicated on a single finding of felony murder, denied [petitioner] constitutionally adequate sentencing safeguards"), *cert. denied*, 112 S.Ct. 427 (1991); *Bertolotti v. Dugger*, 883 F.2d 1503, 1527-28 (11th Cir. 1989) (rejecting challenge to use of felony-murder aggravating circumstance in capital felony murder case), *cert. denied*, 497 U.S. 1032 (1990); *see also Delap v. Dugger*, 890 F.2d 285, 314 n.38 (11th Cir. 1989) ("Had Delap been convicted of felony murder at his first trial, there would be no impediment to a finding of a felony-murder aggravating factor at sentencing.") (emphasis omitted), *cert. denied*, 496 U.S. 929 (1990); *Byrne*, 845 F.2d at 515 n.12 (noting that where defendant was convicted of felony murder, "[t]he fact that one of the aggravating circumstances was one of the elements of the crime does not render the sentence constitutionally infirm"); *see also McMillian v. State*, 594 So.2d 1253, 1278 (Ala. Crim. App. 1991); *People v. Marshall*, 50 Cal.3d 907, 945-46 (Cal. 1990), *cert. denied*, 111 S.Ct. 1023 (1991); *Sanders v. Commonwealth*, 801 S.W.2d 665, 682 (Ky. 1990), *cert. denied*, 112 S.Ct. 107 (1991); *People v. Bean*, 46 Cal.3d 919, 958 (Cal. 1988), *cert. denied*, 494 U.S. 1038 (1990); *State v. Henderson*, 528 N.E.2d 1237, 1243 (Ohio 1988), *cert. denied*, 489 U.S. 1072 (1989); *cf. Wilson v. Commonwealth*, 836 S.W.2d 872, 891 (Ky. 1992) (rejecting similar double jeopardy argument), *cert. denied*, 123 L.Ed.2d 479 (1993); *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868 (Ky. 1992) (same).

The *Middlebrooks* majority relies in part upon *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 567-68 (1979), *cert. denied*, 446 U.S. 941 (1980), and other cases, which predated *Lowenfield*. These cases are contrary to and did not have the benefit of this Court's explication of the narrowing function in *Lowenfield*. *See Middlebrooks*, 840 S.W.2d at 341-42. The majority also cites to *Engberg v. Meyer*, 820 P.2d 70, 90-91 (Wyo. 1991) (Cardine, J., concurring), which misapplied *Lowenfield* and attempted to distinguish

Court's precedents to reject similar "double counting" or "overlapping" contentions.[10] This line of cases firmly

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Lowenfield as limited to cases where the narrowing function occurred during the guilt phase. *See Middlebrooks*, 840 S.W.2d at 342.

[10] *See, e.g., Giarratano v. Procunier*, 891 F.2d 483, (4th Cir. 1989) ("The constitutionality of the [Virginia] statute is buttressed by reading it in the context of the already narrowly defined range of capital offenses."), *cert. denied*, 498 U.S. 881 (1990); *McKenzie v. Risley*, 842 F.2d 1525, 1539 (9th Cir.) ("Just as in *Lowenfield* and *Jurek*, the [jury] findings required by the Montana statutes – that McKenzie tortured and caused the death of Lana Harding [one of six types of homicide punishable by death] – were adequate to place his crimes within the narrow class of offenses for which the death penalty may be appropriate."), *cert. denied*, 488 U.S. 901 (1988); *United States v. Pitera*, 795 F. Supp. 546, 556-57 (E.D.N.Y. 1992) ("As with the statute in *Lowenfield*, [federal statute] significantly narrows the class of murderers eligible for the death penalty at the guilt phase."), *aff'd without published opinion*, 986 F.2d 499 (2d Cir. 1992); *United States v. Pretlow*, 779 F. Supp. 758, 771-72 (D.N.J. 1991) ("Similar to its statutory counterpart in *Lowenfield*, [federal statute] initially narrows the class of death-eligible defendants at the guilt phase by limiting the class. . . . "); *United States v. Cooper*, 754 F. Supp. 617, 622 (N.D.Ill. 1990) (same); *see also State v. Ramseur*, 106 N.J. 123, 188, 524 A.2d 188, 220 (N.J. 1987) (upholding overlap for death-eligible offense for defendant who pays another to commit purposeful murder and payment for murder as aggravating circumstance); *State v. Tassin*, 536 So.2d 402, 409 n.17 (La. 1988) ("The same aggravating circumstances may be an element of the underlying offense of first degree murder and an aggravating circumstance at the penalty phase of trial."), *cert. denied*, 493 U.S. 874 (1989); *State v. Benner*, 533 N.E.2d 701, 708 (Ohio 1988) (rejecting argument that "an aggravating circumstance cannot duplicate an element of the underlying offense"), *cert. denied*, 494 U.S. 1090 (1990); *Bertolotti v. State*, 534 So.2d 386, 387 & n.3 (Fla. 1988) (rejecting claim that aggravating circumstances overlapped with elements of offense, as an alternative

establishes the proposition that while the capital sentencing scheme must fulfill the Eighth Amendment narrowing function, as a matter of legislative prerogative, the State Legislature may decide at what point in the process this occurs. In this case, Tennessee has constitutionally decided to include felony murder in the narrow class of death-eligible murders.

II. Alternatively, the Eighth Amendment Narrowing Function And Individualized Sentencing Requirement Are Fulfilled By Other Provisions in the Tennessee Capital Sentencing Statute

Assuming *arguendo* that this Court concludes that the Tennessee statute does not satisfy the *Jurek* and *Lowenfield* narrowing standards, this case may provide an opportunity to clarify that the narrowing function may be

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ground, by citing *Lowenfield*); *State v. Gardner*, 789 P.2d 273, 280 (Utah 1989) (rejecting "contention that the same aggravating circumstance cannot be relied upon in the guilt phase and in the penalty phase"), *cert. denied*, 494 U.S. 1090 (1990); *State v. Burrell*, 561 So.2d 692, 710 (La. 1990) (upholding use of capital offense as aggravating circumstances), *cert. denied*, 111 S.Ct. 799 (1991); *State v. Marshall*, 586 A.2d 85, 156 (N.J. 1991) ("[N]o constitutional infirmity exists because the aggravating factor found by the jury mirrors an element of the offense of which defendant was convicted."), *supplemental opinion*, 613 A.2d 1059 (1992), *cert. denied*, 113 S.Ct. 1306 (1993); *Haney v. State*, 603 So.2d 368, 379-80 (Ala. Crim. App. 1991) (upholding overlap of aggravating circumstance of pecuniary gain and capital offense of murder for hire, and citing other cases upholding similar overlap), *cert. denied*, 113 S.Ct. 1297 (1993); *Johnson v. State*, 823 S.W.2d 800, 806 (Ark. 1992) (rejecting "double counting" argument that pecuniary gain element of offense and as aggravating circumstance violates Eighth Amendment), *cert. denied*, 112 S.Ct. 3043 (1992).

fulfilled by other provisions in the capital sentencing scheme.

A. Systemic Assessment

As the *Gregg* joint opinion noted, "each distinct [capital sentencing] system must be examined on an individual basis" to ascertain whether it passes constitutional muster.[11] A systemic evaluation is appropriate since capital sentencing schemes are not susceptible to mathematical precision. As was noted in *Proffitt*:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

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[11] *Gregg*, 428 U.S. at 195 (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoted in *Zant*, 462 U.S. at 875); *see also Middlebrooks*, 840 S.W.2d at 348-49 (Drowota, J., concurring and dissenting) ("The system must be examined as a whole just as it works as a whole."); *see generally Arave v. Creech*, 113 S.Ct. 1534, 1543, 123 L.Ed.2d 188 (1993) (considering "the statutory scheme" in assessing the validity of challenged aggravating circumstance); *Pulley v. Harris*, 465 U.S. 37, 49 (1984) (noting "at least in light of the other safeguards in the Texas statute, proportionality review would have been constitutionally superfluous"); *Proffitt*, 428 U.S. at 254 n. 11 (joint opinion of Stewart, Powell, & Stevens, JJ.) ("[W]e examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the . . . capital-sentencing scheme, *when viewed in its entirety*, will result in the capricious or arbitrary imposition of the death penalty.") (emphasis added).

Proffitt, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added). A review of the Tennessee statute before the Court shows that the Eighth Amendment narrowing function is satisfied by other protections in the capital sentencing scheme.

The bifurcated system guides and channels the exercise of the jury's discretion by focusing the trier of fact on relevant factors and issues and by separating the guilt determination from any sentence.[12] During the guilt phase, the jury must determine whether a death-eligible offense (*i.e.*, first-degree felony murder) has been committed by the defendant beyond a reasonable doubt.[13] In the event a unanimous verdict is obtained, the sentencer must determine during the penalty phase whether death or life imprisonment is an appropriate sentence.[14]

The sentencer is not bound by any decisions made during the guilt phase. During the penalty phase, the jury must unanimously determine the existence of at least one

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[12] *See* Tenn. Code Ann. § 39-13-204(a) (previously Tenn. Code Ann. § 39-2-203(a) (Supp.1988)); *see also Zant*, 462 U.S. at 875; *Gregg*, 428 U.S. at 191-92, 195 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[13] Tenn. Code Ann. § 39-13-202(a)(2) (felony murder) (previously Tenn. Code Ann. § 39-2-202(a) (Supp.1988) (reproduced in *Middlebrooks*, 840 S.W.2d at 341)).

[14] Tenn. Code Ann. § 39-13-202(b) (previously Tenn. Code Ann. § 39-2-202(b) (Supp.1988)).

aggravating factor beyond a reasonable doubt (*e.g.*, felony murder).[15] The unanimous finding of aggravating circumstances alone does not result in a death sentence, as the trial judge instructs the jury to determine whether any aggravating circumstances outweigh any mitigating circumstances.[16]

Mitigating circumstances advance the Eighth Amendment "requirement of individualized sentencing in capital cases, . . . by allowing the jury to consider all relevant mitigating evidence." *Blystone*, 494 U.S. at 307; *see also Zant*, 462 U.S. at 879. Tennessee, like twenty-two other States, expressly allows consideration of the defendant's minor role as a mitigating factor.[17] The jury may consider

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[15] *See* Tenn. Code Ann. §§ 39-13-204(f), (i) (previously Tenn. Code Ann. §§ 39-2-203(f), (i) (Supp.1988)); *see also* Tenn. Code § 39-13-204(i)(7) (felony-murder aggravating circumstance) (previously Tenn. Code Ann. § 39-2-203(i)(7) (Supp.1988) (reproduced in *Middlebrooks*, 840 S.W.2d at 341)); *Bertolotti*, 883 F.2d at 1528.

[16] Tenn. Code Ann. §§ 39-13-204(e), (f), (g) (previously Tenn. Code Ann. §§ 39-2-203(e), (f), (g) (Supp.1988)); *see also Blystone*, 494 U.S. at 304-05 (discussing function of aggravating and mitigating circumstances); *Jurek*, 428 U.S. at 271 (joint opinion of Stewart, Powell, & Stevens, JJ.) (same); *Proffitt*, 428 U.S. at 253 (joint opinion of Stewart, Powell, & Stevens, JJ.) (discussing role of aggravating and mitigating circumstances to minimize the risk that the death penalty might "be imposed in an arbitrary or capricious manner").

[17] Tenn. Code Ann. § 39-13-204(j)(5) ("The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.") (previously Tenn. Code Ann. § 39-2-203(j)(5) (Supp.1988)); Appendix A (listing States); *see also Enmund*, 458 U.S. at 792 (noting mitigating circumstances concerning minimal

"any mitigating circumstances" and is not limited to those enumerated in the statute.[18]

The jury must unanimously agree on a sentence of death.[19] If a death sentence is rendered, the jury must identify in writing the statutory aggravating circumstances and "[s]ignify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating

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participation "reduce the likelihood that a person will be executed for vicarious felony murder"); *Lockett v. Ohio*, 438 U.S. 586, 617 n.3 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

[18] Tenn. Code Ann. § 39-13-204(j) (previously Tenn. Code Ann. § 39-2-203(j)).

Tennessee now has a statutory catch-all mitigation provision, expressly allowing the jury to consider "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." *See* Tenn. Code Ann. § 39-13-204(j)(9); *see also Blystone*, 494 U.S. at 305 & n.2 (discussing role of "catchall" mitigating factor); *see generally Lockett*, 438 U.S. at 604 (opinion of Burger, C.J.) (holding that the Constitution forbids the jury from being "precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offenses that the defendant proffers as a basis for a sentence less than death").

Other States have similar statutory catch-all mitigation provisions. *See, e.g.*, Cal. Penal Code § 190.3(k) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); Appendix A (listing 15 States); *Lockett*, 438 U.S. at 617 n.3 (Blackmun, J., concurring in part and concurring in the judgment) (listing State statutes).

[19] Tenn. Code Ann. §§ 39-13-204(g), (h) (previously Tenn. Code Ann. §§ 39-2-203(g), (h) (Supp.1988)).

circumstances."[20] If the jury cannot reach unanimous agreement on the punishment, a sentence of life imprisonment is imposed by the judge.[21]

As this Court has observed, meaningful appellate review of death sentences minimizes the risk of arbitrary and capricious sentencing determinations.[22] In Tennessee, a convicted capital defendant has a statutory right of direct appeal to the court of criminal appeals; any affirmed conviction and death sentence are automatically reviewed by the Tennessee Supreme Court.[23] Each level of appellate review includes a review of whether: the sentence was imposed arbitrarily; the evidence supports the aggravating circumstances; any aggravating circumstances outweigh any mitigating circumstances; the death sentence is excessive or disproportionate in light of similar cases, taking into account the defendant and the nature of the crime.[24] The reviewing court may, where

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[20] Tenn. Code Ann. § 39-13-204(g)(2)(A) (previously Tenn. Code Ann. § 39-2-203(g)(2) (Supp.1988) ("Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.")).

[21] Tenn. Code Ann. § 39-13-204(h) (previously Tenn. Code Ann. § 39-2-203(h) (Supp.1988)).

[22] *See, e.g., Zant*, 462 U.S. at 875, 879-80; *Proffitt*, 428 U.S. at 258-59 (joint opinion of Stewart, Powell, & Stevens, JJ.); *Gregg*, 428 U.S. at 195, 198 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[23] Tenn. Code Ann. § 39-13-206(a)(1) (previously Tenn. Code Ann. § 39-2-205(a) (Supp.1988) (automatic review by the Tennessee Supreme Court)).

[24] Tenn. Code Ann. § 39-13-206(c)(1) (previously Tenn. Code Ann. § 39-2-205(c)(1) (Supp.1988)).

appropriate, "[m]odify the punishment to life imprisonment."[25]

To be sure, all of these steps imposed by the Tennessee Legislature are not constitutionally required. For example, this Court has held that proportionality review by a reviewing court is not constitutionally mandated, although it provides "an additional safeguard against arbitrarily imposed death sentences." *Pulley*, 465 U.S. at 50. Taken as a whole, these protections under the Tennessee statute satisfy the Eighth Amendment requirement that the "sentencing discretion [be] guided and channeled by a *system* that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." *Proffitt*, 428 U.S. at 258 (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added).

B. Legislative Prerogative

Finally, *amici* wish to emphasize that many of the issues concerning the circumstances under which capital punishment may be warranted are issues of legislative – not constitutional – policy. In fact, this Court has not dictated a specific capital sentencing scheme, recognizing that "[t]he State has considerable freedom to structure its capital sentencing system as it sees fit."[26]

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[25] Tenn. Code Ann. § 39-13-206(d)(2) (previously Tenn. Code Ann. § 39-2-205(d)(2) (Supp.1988)).

[26] *Cabana*, 474 U.S. at 386-87; *see also Spaziano*, 468 U.S. at 464 ("As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its

Once constitutional standards have been satisfied, the eligibility of any offense for capital punishment, including felony murder, is the product of legislative judgment. *See, e.g., Gregg*, 428 U.S. at 186-87 ("The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures.") (joint opinion of Stewart, Powell, & Stevens, JJ.). For example, this Court has already recognized that intent to kill is not a prerequisite for the capital punishment of all felony murders, although as a matter of legislative policy some States have imposed this standard. *See* note 2, *supra*, & Appendix A. Moreover, a constitutional infirmity is not established where a few States – or even one – favor a particular capital sentencing procedure in direct contrast to the position adopted in a

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capital sentencing scheme.") (citations omitted); *Gregg*, 428 U.S. at 176 (joint opinion of Stewart, Powell, & Stevens, JJ.); *Bertolotti*, 883 F.2d at 1528 n.22.

This Court has afforded States flexibility in determining "how" to set up their capital sentencing schemes and "when" in this process Eighth Amendment standards should be satisfied. *See, e.g., Cabana*, 474 U.S. at 385 ("The decision whether a particular punishment – even the death penalty – is appropriate in any given case is not one that we have ever required to be made by a jury."); *id.* at 386-87 (noting State has flexibility to determine when, during the criminal justice process, an *Enmund* finding must be made); *Zant*, 462 U.S. at 890 ("[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances."); *accord Spaziano*, 468 U.S. at 463 n.9 (noting State practices in permitting a jury or judge to impose the death penalty); *Zant*, 462 U.S. at 879 n.17 ("A State is, of course, free to decide as a matter of state law to limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing.").

majority of States. *See Spaziano*, 468 U.S. at 464 ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."). For example, while most States have a bifurcated system, Florida has a trifurcated system for making capital punishment sentencing decisions, which has been upheld by this Court. *See id.* at 464-65.

Just as some States prefer to adopt "weighing" schemes as part of their capital statute, while others do not, *see, e.g.*, note 7, *supra*, here, Tennessee and other States have chosen to permit a felony-murder aggravating circumstance to be considered following a guilt determination of first-degree felony murder. Further some States have chosen to vary the number of felonies which may be considered at the sentencing phase from the number considered at the guilt phase. *See, e.g.*, Appendix A. Absent a constitutional infirmity, these legislative decisions represent a State policy choice. Related policy considerations were implicated by the sentencing schemes considered in *Jurek* and *Lowenfield* and upheld by this Court. Based upon this rationale, *amici* respectfully request that the statute at bar be upheld.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be reversed.

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APPENDIX A
Overview of 1993 State Capital Statutes and Felony Murder Provisions*

FELONY-MURDER CAPITAL OFFENSES

Seven states permit capital punishment for felony murder *simpliciter* (where murder resulting during the commission of a felony is considered at both the guilt and sentencing phases of a capital trial):	Ariz. Rev. Stat. Ann. §§ 13-1105(A)(2), 13-703(F)(5) (robbery/ pecuniary gain), 13-703(F)(9) (felony murder during commission of child abuse); Cal. Penal Code §§ 189, 190.2(a)(17); Fla. Stat. ch. 782.04(1)(a)(2), 921.141(5)(d); Ga. Code Ann. §§ 16-5-1(c), 17-10-30(b)(2); Md. Ann. Code art. 27, §§ 407, 408, 409, 410, 413(d)(10); Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-303(7), (9); N.C. Gen. Stat. §§ 14-17, 15A-2000(e)(5).
Five states authorize capital punishment in felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life:	Ark. Code Ann. § 5-10-101(a)(1) (circumstances manifesting extreme indifference to the value of human life); Del. Code Ann. tit. 11, §§ 636(a)(2), (b) (recklessly causes death); Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (strong probability of death or great bodily harm); N.H. Rev. Stat. Ann.

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630:5(VII)(a)(1), (3) (purposely killed or engaged in conduct defendant knew would create grave risk of death); Tenn. Code Ann. § 39-13-202(a)(2), (a)(3) (reckless killing) (1989 enactment).

Capital felony-murder statutes in nine states require an intent to kill:

Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), (b), 13A-5-51, 13A-6-2(a)(2) (with intent to cause death); La. Rev. Stat. Ann. 14:30(A)(1), La. Code Crim. Proc. Ann. art. 905.4(A)(1) (specific intent to kill); N.H. Rev. Stat. Ann. §§ 630:1(I)(b), (I)(e), (I)(f), 630:5(VII)(a)(1), (3) (knowingly cause the death of another); Ohio Rev. Code Ann. §§ 2903.01(B)-(D), 2929.02(A), 2929.04(A)(7) (intended to cause death); Or. Rev. Stat. §§ 163.095(2)(d), 163.115(1)(b) (intentionally committed homicide); Tex. Penal Code Ann. §§ 19.02(a)(3), 19.03(a)(2) (intentionally commits murder); Utah Code Ann. § 76-5-202(1) (intentionally or knowingly causes death); Va. Code § 18.2-31 (willful, deliberate, and premeditated killing); Wyo. Stat.

§§ 6-2-101(a), 6-2-102(h)(iv), (xii) (kills purposely and with premeditated malice).

One state does not have an express capital felony-murder offense statute:

N.J. Stat. Ann. §§ 2C:11-3a, 2C:11-3b (felony murder not a capital offense).

FELONY-MURDER AGGRAVATING CIRCUMSTANCES

Five states consider felony-murder circumstances only as an aggravating factor for capital murder:

Ky. Rev. Stat. Ann. §§ 507.020 (intent to cause death or wantonly engages in conduct which creates a grave risk of death), 532.025(2)(a)(2) (felony-murder aggravating circumstance); Mo. Rev. Stat. §§ 565.020 (knowingly causes death after deliberation upon the matter), 565.032(2)(11) (felony-murder aggravating circumstance); 18 Pa. Cons. Stat. §§ 2502(A) (intentional killing), 42 Pa. Cons. Stat. § 9711(D)(6) (felony-murder aggravating circumstance); S.C. Code Ann. §§ 16-3-20(C)(a)(1) (killing with malice aforethought), 16-3-30 (felony-murder aggravating circumstance); Wash. Rev. Code

§§ 9A.32.030 (premeditation), 10.95.020(9) (felony-murder aggravating circumstance).

Statutes in three states require a showing of culpable mental state such as recklessness or extreme indifference to human life for felony-murder aggravating circumstances:

Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (strong probability of death or great bodily harm); N.H. Rev. Stat. Ann. §§ 630:1(I)(b), (I)(e), (I)(f), 630:5 (VII)(a)(1), (3) (purposely killed or engaged in conduct defendant knew would create grave risk of death); Tenn. Code Ann. § 39-13-202(a)(2), (a)(3) (reckless killing) (1989 enactment).

Statutes in seven states require an intent to kill for felony-murder aggravating circumstances (listing capital felony-murder and pertinent aggravating circumstance provisions):

Colo. Rev. Stat. §§ 16-11-103(5)(g), 18-3-102(1)(b) (intentionally caused death); Idaho Code §§ 18-4003(d), 19-2515(g)(7) (specific intent to cause death); Ill. Rev. Stat. ch. 38, para. 9-1(a)(3), (b)(6)(b) (intent to kill or knowledge that acts created strong probability of death or great bodily harm); Ind. Code §§ 35-42-1-1(2), 35-50-2-9(b)(1) (intentional killing during specified felonies); Miss. Code Ann. §§ 97-3-19(2)(e), (f), 99-19-101(7) (jury must find

defendant actually killed, attempted to kill, intended that killing take place, or contemplated that lethal force would be used); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)-(b) (defendant killed, attempted to kill, or knew life would be taken or lethal force used); N.M. Stat. Ann. §§ 30-2-1(A)(2), 31-20A-5 (intent to kill). *See also* Neb. Rev. Stat. §§ 28-303(2), 29-2523(1) (alternative aggravating circumstance required for imposition of death penalty); Okla. Stat. tit. 21, §§ 701.7(B), 701.9(A), 701.10(C), 701.11, 701.12 (same); S.D. Codified Laws Ann. §§ 22-16-4, 23A-27A-1 (same).

Four states list parallel felonies for both the guilt and sentencing phases of capital felony-murder trials:

Cal. Penal Code §§ 189, 190.2(a)(17) (robbery, kidnapping, rape, sodomy, lewd or lascivious act upon person of a child under age of 14, oral copulation, burglary in the first or second degree, arson, train wrecking, mayhem, rape by instrument); Del. Code Ann. tit. 11, §§ 636(a)(2), 4209(e)(2) (any felony); Idaho Code §§ 18-4003(d), 19-2515(g) (aggravated

battery on child under 12, arson, rape, robbery, burglary, kidnapping, mayhem); Tenn. Code Ann. §§ 39-13-202(a)(2), (3), 39-13-204(i)(7) (arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb) (1989 enactment).

One state increases the number of felonies which may be considered at the sentencing phase from the number which may be considered at the guilt phase of a capital felony-murder trial:

Colo. Rev. Stat. §§ 18-3-102(1)(a) (enumerating at guilt phase arson, robbery, burglary, kidnapping, sexual assault, escape), 16-11-103(5)(d), (f) (enumerating at sentencing phase kidnapping and any Class 1, 2, or 3 felony).

Other states with capital felony-murder statutes reduce the number of felonies which may be considered at the sentencing phase from the number which may be considered at the guilt phase of a capital felony-murder trial:

See e.g, Mont. Code Ann. §§ 45-5-102(1)(b) (enumerating at guilt phase robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, felony assault, aggravated assault, or any other forcible felony), 46-18-303(7) (enumerating at sentencing phase only aggravated kidnapping).

MITIGATING CIRCUMSTANCES

Twenty-three states expressly permit the consideration of a defendant's minor participation in a capital murder as a mitigating circumstance:

Ala. Code § 13A-5-51(4); Ariz. Rev. Stat. Ann. § 13-703(G)(3); Ark. Code Ann. § 5-4-605(5); Cal. Penal Code § 190.3(f); Colo. Rev. Stat. § 16-11-103(4)(d); Conn. Gen. Stat. § 53a-46a(g)(4); Fla. Stat. Ch. 921.141(6); Ind. Code § 35-50-2-9(c)(4); Ky. Rev. Stat. Ann. § 532.025(2)(b)(5); La. Code Crim. Proc. Ann. art. 905.5(g); Miss. Code Ann. § 99-19-101(6)(d); Mo. Rev. Stat. § 565.032(3)(4); Mont. Code Ann. 46-18-304(6); Neb. Rev. Stat. § 29-2523(2)(e); N.H. Rev. Stat. Ann. 630:5(IV)(c); N.C. Gen. Stat. § 15a-2000(f)(4); 42 Pa. Cons. Stat. § 9711(E)(7); S.C. Code Ann. § 16-3-20(C)(b)(4); Tenn. Code Ann. § 39-13-204(j)(5) (1989 enactment); Utah Code Ann. § 76-3-207(3)(f); Vt. Stat. Ann. tit. 13 § 2303(e)(3); Wash. Rev. Code § 10.95.070(4); Wyo. Stat. § 6-2-102(j)(iv). *See also* Ill. Rev. Stat. ch. 38, para. 9-1(c)(5) (defendant not present during commission of the act causing death);

Md. Ann. Code art. 27, § 413(g)(6) (defendant's act is not the sole proximate cause of victim's death); Ohio Rev. Code Ann. § 2929.04(B)(6) (degree of offender's participation to be considered as mitigating factor).

Fifteen states have statutory "catch all" mitigating circumstance provisions:

Cal. Penal Code § 190.3(k) (any other circumstance which extenuates the gravity of the crime); Colo. Rev. Stat. § 16-11-103(4)(l) (any other evidence bearing on question of mitigation); Conn. Gen. Stat. §§ 53a-46a(b), (d) (any mitigating factor); Idaho Code § 19-2515(d) (all relevant evidence in mitigation); Ind. Code § 35-50-2-9(c)(8) (any other circumstances appropriate for consideration); Ky. Rev. Stat. Ann. § 532.025(2) (any mitigating circumstances otherwise authorized by law); La. Code Crim. Proc. Ann. art. 905.5(h) (any other relevant mitigating circumstance); Md. Ann. Code art. 27, § 413(g)(8) (any other facts); N.H. Rev. Stat. Ann. § 630:5(VI)(i) (other factors in defendant's background or character); N.C. Gen. Stat. § 15A-2000(f)(9) (any other circumstance arising from

the evidence); Ohio Rev. Code Ann. § 2929.04(B)(7) (any other factors that are relevant); 42 Pa. Cons. Code § 9711(E)(8) (any other evidence of mitigation); Tenn. Code Ann. § 39-13-204(j)(9) (any other mitigating factor) (1989 enactment); Utah Code Ann. § 76-3-207(3)(g) (any other fact in mitigation); Wyo. Stat. § 6-2-102(j)(viii) (any other fact or circumstance).

APPENDIX B

California Attorney General's Office
Pending Capital Litigation on Direct Appeal
Including Felony Murder Convictions
and Special Circumstances (Apr. 1993)

Number of Felony Murder Capital Offense Convictions
Involving Felony Murder Special Circumstances

1 Felony Murder Special Circumstance	37
1 Felony Murder Special Circumstance Plus Other Special Circumstance(s)	37
2 Felony Murder Special Circumstances	28
2 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	25
3 Felony Murder Special Circumstances	8
3 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	4
4 Felony Murder Special Circumstances	4
4 Felony Murder Special Circumstances Plus Other Special Circumstance(s)	3
Total Felony Murder Special Circumstance Cases	146
(% of total cases pending on appeal)	(68%)
Total cases pending on direct appeal	212

* * *

California Penal Code § 189 provides, in pertinent part, for first-degree felony murder:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or *which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under [Penal Code] Section 286, 288, 288a, or 289,* is murder of the first degree; and all other kinds of murders of the second degree.

California Penal Code § 190.2(a)(17) provides for the special circumstance of felony murder:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
>
> (i) Robbery in violation of [Penal Code] Section 211 or 212.5.
>
> (ii) Kidnapping in violation of Section 207 or 209.
>
> (iii) Rape in violation of Section 261.
>
> (iv) Sodomy in violation of Section 286.
>
> (v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of subdivision (b) of Section 451.

(ix) Train wrecking in violation of Section 219.

(x) Mayhem in violation of Section 203.

(xi) Rape by instrument in violation of Section 289.